Jackson v. Birmingham Board of Education

Oral Argument - November 30, 2004

John Paul Stevens

We'll hear argument in Jackson against the Birmingham Board of Education.

Mr. Dellinger.

Walter E. Dellinger, III

Justice Stevens, and may it please the Court:

Under the decision below, title IX stands alone as the only major civil rights statute that would permit retaliation against those who complain that the law is being violated.

There are at least a half a dozen anti-discrimination laws that do not contain a separate retaliation provision, and every one of them has been found to prohibit retaliation as one kind of discrimination.

There's a reason for that.

Anti-discrimination laws simply can't be effective if threats of retaliation are allowed to chill those who would seek to bring their institutions into compliance.

Anthony M. Kennedy

Of course, the question is whether... that... that may be true, but there would be an administrative remedy.

The question here is a private cause of action for damages.

Walter E. Dellinger, III

That is true, Justice Kennedy.

Anthony M. Kennedy

Even... even assuming the... the validity of your premise, you still have another step.

Walter E. Dellinger, III

I understand that other step, and I think that was largely resolved in Cannon v. the City of Chicago, a decision which this Court upheld a right of action to enforce title IX, even though there was also administrative remedies available and which was validated by Congress, as this Court... every member of this Court recognized in... in Sandoval.

Antonin Scalia

Yes, but I thought... I thought that Cannon... we've... we've allowed Cannon to stay on the books, but I thought we have sworn off the kind of creation of... of implied remedies that Cannon exemplifies.

Walter E. Dellinger, III

In this case, there is no doubt that the two established principles together that are settled support this cause of action.

The first is that there is a cause of action to enforce title IX.

That's Cannon through Congress, through Sandoval, through... your opinion in Sandoval acknowledges that Cannon is solid law and, the second point, that the statute itself is violated.

Title IX is violated by retaliatory action against Coach Jackson.

He's... and... and this is an important part of title IX because, particularly here, people like Coach Jackson need to come forward because students are often minors.

They're not in the best position to know the budgets.

It is people like Coach Jackson who make it work, and indeed, I think what is recognized about the... about the cause of action for retaliation is that it is very important to enable people to bring their institutions into compliance without resorting to litigation.

Antonin Scalia

It's very... it's very useful, I'm sure, but it... it could be very disruptive also, I am sure.

If I were... if I were a coach, one of the first things... especially a coach of a women's team in high school, one of the first things I would do would be to complain about not... not getting enough facilities.

This would make it a lot more difficult to fire me whether... whether I'm a lousy coach or not.

You... you would have to think twice before you fire me because I would have a retaliation claim.

Walter E. Dellinger, III

Justice Scalia, the burden, of course, is on the plaintiff to demonstrate causation.

And you should take great comfort from the fact, the Court can take great comfort from the fact that retaliation has been established as a violation of all of the major civil rights statutes, going back to 30 years to title VI--

Antonin Scalia

Some of them specifically provide for retaliation, don't they?

Walter E. Dellinger, III

--That is correct.

Antonin Scalia

Why do they do that if, as you assert, the mere word discrimination embraces it?

Walter E. Dellinger, III

Well, Congress has taken a different approach.

In some cases, there would be a textual problem.

Title VII, for example, speaks of discrimination based on such individual's race or national origin.

Title... and... and therefore, it might need a specific retaliation provision.

Title IX speaks upon... about discrimination on the basis of sex.

And here I think to... to allay your concern about the coach, we have had... title IX's retaliation provision has been the established law.

It was the law at the time Congress... it was understood, at the time Congress

enacted title IX, that the identical wording of title VI had been construed by the administrative agency to include a cause of action for retaliation.

Congress enacted title IX against the background of the Sullivan decision, which had recognized that discrimination can include retaliation.

So that it comes as no surprise that every court of appeals that has addressed this issue has found that there's retaliation under title IX.

In over 30 years, there... at most we can find 140 reported cases in the Federal system where there is a claim for retaliation under title IX, and under title IX and all of the other discrimination provisions, courts have found it perfectly satisfactory to work out the causation requirements and... in... in dealing with retaliation cases.

Now, here, what the respondent did is they discharged the coach who was seeking equal treatment for girls.

When it singled Coach Jackson out for adverse treatment, it was discriminating, and when it did so, because he was seeking equal treatment for girls, it was discriminating on the basis of sex.

Antonin Scalia

Do you think that it... it is a reasonable description of what happened... he was fired for complaining about his girls' team not getting enough facilities... that he was, on the basis of sex, excluded from participation in, denied benefits of, or subjected to discrimination under an education program?

Walter E. Dellinger, III

Absolutely.

Antonin Scalia

Do you think that... that remotely describes what happened to this coach?

Walter E. Dellinger, III

Absolutely.

First of all, the... the court of appeals correctly says... in the petition appendix at 3a, the court of appeals says we assume for the purposes of this appeal that the board retaliated against Jackson for complaining about perceived title IX violations.

But for the discrimination on the basis of sex, he would not have complained, and he not... had he not made a complaint about sex discrimination, he wouldn't have lost his position.

He is denied the benefit of coaching in the program.

He's denied the ability to participate in this federally funded program as a coach, and he is discriminated against by being singled out for retaliation.

And this is not a case in which... that has concern... I mean, Justice Kennedy raised the question about this being a funding case, and I understand the special sensitivity that the Court has about rules that are based upon spending requirements where you want to be sure that States understand what they're agreeing to when they accept the Federal funds.

This is not a case in which it could not have been anticipated when those funds were accepted.

At that time, at the time these funds were accepted, which would have been about 1999 or 2000, title IX's ban on sex discrimination was itself, of course, universally known.

Retaliation was understood to be part and parcel of that.

We had had 30 years where both the Department of Education and--

Anthony M. Kennedy

But... but that's again the question of the substantive scope of the provision, and that's different from whether there was a congressional intent to create a private cause of action for this sort of violation.

And was it... Virginia Bankshares and so forth tells us that this is not the heyday of prior cause of actions anymore.

You have to show that there's a congressional intent in the Spending Clause to create a private cause of action for damages.

Walter E. Dellinger, III

--I think the Court--

Anthony M. Kennedy

And that's... that's quite separate from--

Walter E. Dellinger, III

--Yes.

I... I--

Anthony M. Kennedy

--from this... from the question of substantive liability.

Walter E. Dellinger, III

--I understand that.

Here, first of all, when Congress acted, unlike the earlier time when it passed title VI, when Congress passed title IX, it was a background in the law from Sullivan v. Little Hunting Park that... that retaliation was considered a part of discrimination.

The title VI regulations were themselves well known based on identical language, virtually verbatim language.

It provided for retaliation.

And moreover, this Court has recently as the Davis case, Franklin and Davis, and in the North Haven case has found that employment discrimination, sexual harassment by teachers and peer-on-peer sexual harassment all come within title IX and have, therefore, agreed that Cannon v. the City of... v. the University of Chicago creates that cause of action.

Now, this case is actually a lot easier than Davis, even taking into account the concerns that... that you and other Justices expressed there, because this is not a case where liability is being imposed, you know, for the acts of third parties like students over whom you may have limited control.

This is deliberately undertaken actions by the responsible officials acting intentionally.

It's not a novel concept the way one could argue that peer-on-peer sexual harassment was as a part of discrimination.

But it's been accepted for more than 30 years by the responsible Federal agency.

Antonin Scalia

Yes, but it's separate enough from discrimination that in other statutes, although Congress does create a cause of action for discrimination, it goes out of its way to create a separate cause of action for retaliation.

It's sufficiently separate, and if it is that sufficiently separate, it doesn't seem to me that you could clearly say that... that when the State signed on to receiving Federal funds under title IX, they should have known that this door to litigation was being opened to them.

Yes, litigation for... for discrimination against... against female athletes, but not... not discrimination suits alleging retaliation.

That's a whole, new area.

Walter E. Dellinger, III

Justice Scalia, with... with all due respect, I don't think there's any way, when the district accepted these funds, that they could have reasonably relied on the assumption that they would be free to retaliate against people who tried to comply--

Sandra Day O'Connor

Well, but there was... there was... let's go back to this for just a moment... an administrative remedy available for retaliation expressly under the regs?

Walter E. Dellinger, III

--That is correct.

Sandra Day O'Connor

And did this petitioner seek an administrative remedy at all?

Walter E. Dellinger, III

He did not seek an administrative remedy.

He went through the school system itself at every level.

He went through five different levels, following the chain of command.

Sandra Day O'Connor

What would the administrative remedy have allowed here--

Walter E. Dellinger, III

Well--

Sandra Day O'Connor

--had it been sought?

Walter E. Dellinger, III

--Here, as in Franklin, as in Davis, as in Cannon v. the University of Chicago, as in every one of this Court's title IX cases, indeed, as in all of its title VI cases involving Federal funds with race, you can call this to attention of the office of civil rights of the relevant agency and they can begin an inquiry.

Ultimately they have the authority of the draconian sanction of cutting off the funds to the--

Ruth Bader Ginsburg

Do they have any other sanction?

Because the notion of an administrative remedy ordinarily would be a remedy for the individual who's complaining.

But as I understand it, this administrative process, this detailed administrative process, leads only to one sanction, the one you have described as draconian.

Walter E. Dellinger, III

--That is correct.

Sandra Day O'Connor

So that's it.

It would not have permitted a restoration of the job to the--

Walter E. Dellinger, III

That is correct.

Sandra Day O'Connor

--petitioner.

Walter E. Dellinger, III

That is not part of the... the administrative process is only about institutional funding, which is why the Court has consistently upheld the right to bring these actions for what are violations of the statute itself.

David H. Souter

Well, if we don't accept... let's assume, just for the sake of argument, that... that we're having trouble accepting the... the analysis that it is a violation of the statute in the statute's own terms.

You then made the argument that, in fact, you should recognize retaliation as a claim because in the context of... of school students and so on, if you don't allow retaliation, the teachers are not going to blow the whistle, and if the teachers blow the whistle, the statute is going to be a dead letter.

Walter E. Dellinger, III

That is--

David H. Souter

So... so the... the argument is you... you should recognize this as a necessity.

That, it seems to me, still goes back to Justice O'Connor's question.

Why do we have to recognize a private cause of action as opposed to the government allowing an administrative remedy?

And I thought you were leading up to saying the administrative remedy simply isn't effective because it's so draconian that, in fact, they don't impose it, or for some other reason.

So my question is, is there an argument to say that the administrative remedy simply is not good enough to preclude... to... to deter retaliation and that's why you've got to have a private cause of action?

Walter E. Dellinger, III

--That... that is absolutely right.

David H. Souter

What's... what are the facts?

What's the empirical evidence for that?

Walter E. Dellinger, III

Well--

Sandra Day O'Connor

Do you know if administrative sanctions have been imposed under title IX against schools?

Walter E. Dellinger, III

--Well, I'm sure there have been some instances in which there have been administrative sanctions under title IX.

And I don't... I do not have figures on those, Justice O'Connor.

But let me--

Ruth Bader Ginsburg

Have funds--

Walter E. Dellinger, III

--let me suggest--

Ruth Bader Ginsburg

--have funds... Mr. Dellinger, have funds ever been withdrawn from any school because of a violation of--

Walter E. Dellinger, III

--Not to my knowledge.

Ruth Bader Ginsburg

--title IX?

Walter E. Dellinger, III

But I think--

Antonin Scalia

That could be because--

Walter E. Dellinger, III

--I actually have--

Antonin Scalia

--the sanction is so draconian that nobody in his right mind is not going to rehire the coach.

Of course, they're going to rehire.

I... I find it hard to believe why a draconian sanction is ineffective.

Walter E. Dellinger, III

--Well, if it's never... I... I--

Antonin Scalia

It seems to me it's... it's overwhelmingly effective.

You tell the school you either rehire the coach or we're cutting off your money.

Walter E. Dellinger, III

--Justice--

Antonin Scalia

Is it hard to decide what they're going to do?

Walter E. Dellinger, III

--I do have an answer, first, for Justice Ginsburg's question from Ms. Greenberger.

The sanction has never been imposed under title IX of cutting off funds.

And it--

Ruth Bader Ginsburg

And I can't imagine anyone who would want such a sanction.

It doesn't help--

Walter E. Dellinger, III

--That is certainly not what--

Ruth Bader Ginsburg

--the girls on the team.

Walter E. Dellinger, III

--Coach... Coach Jackson would have sought, and... and because that process is not one that's responsive to the individual case... if you're down in Birmingham, Alabama, the idea that there is some office that has control over Federal funds that's never imposed a sanction, the fact of the matter is... and it's the reason--

Anthony M. Kennedy

Well, you're saying the coach cares more about it than the Government does?

Walter E. Dellinger, III

--That may well be the case, absolutely.

And Coach Jackson--

Anthony M. Kennedy

Well, if... if the Government is charged with... with just spending the funds and doesn't think that this is worth its time, why should there be a private cause of action--

Walter E. Dellinger, III

--Because--

Anthony M. Kennedy

--when... when a private cause of action is harder for us to imply than it... than it is to an administrative remedy?

Walter E. Dellinger, III

--Because in this case people like Coach Jackson... it's hard enough for Coach Jackson to come forward.

If he's not able to... if he's not protected and able to come forward, if retaliation is possible, then you can't expect the... the teenagers themselves to carry this burden.

And in fact, it's the reason this Court recognizes a private cause of action in Franklin and in Davis and in Cannon itself, that you're not going to protect the whistle blower and they're not going to be able to come forward.

And it's not just whistle blowers, Justice Kennedy.

It's people that want to make their institutions comply and when those efforts at compliance result in penalties against them.

It has not led to an excessive amount of litigation, but it has been very effective in giving people comfort to know that they can't be retaliated against.

And... and I... I understand the... going to the necessity, but I do think I'm very comfortable with the statute because it is a form of discrimination on the basis of sex.

It is part and parcel.

The history of discrimination, on which title VI drew, was that firing people from their jobs is what you did when they complained about discrimination, when they tried to vote, when they tried to enroll their students in schools, and it is part and parcel of that discrimination.

And it is discrimination against Coach Jackson for his actions on behalf of sex.

Thank you.

Ruth Bader Ginsburg

Mr.--

Walter E. Dellinger, III

I'll reserve the balance of my time.

Sandra Day O'Connor

Mr. Gornstein, do you have any light to shed on the extent to which administrative sanctions have ever been imposed against schools and... and the feasibility of going that route?

Irving L. Gornstein

Administrative sanction has never been imposed under title IX.

Anthony M. Kennedy

They have been under title VI?

Irving L. Gornstein

There has been one case in which an administrative sanction was imposed under title VI, Justice Kennedy.

It... the agency does have some flexibility to attempt to get voluntary resolutions that are short of the sanction, the final sanction, but--

Sandra Day O'Connor

Do you take the position that what occurred here can amount to a direct violation of the statute as discrimination?

Irving L. Gornstein

--We do, Justice... Justice O'Connor.

I'm sorry.

Retaliation against a person because that person has complained about sex discrimination under title IX is itself discrimination within the meaning of title IX.

And that conclusion flows from four considerations, beginning with the Court's decision critically in Sullivan because in that case, the Court held that a person subjected to retaliation because he complained about racial discrimination against his lessee could sue under section 1982's prohibition, which only prohibits racial discrimination.

Against the backdrop of that decision in Sullivan, Congress would have understood its prohibition against sex discrimination to afford comparable protection against retaliation.

So a person who is subjected--

Sandra Day O'Connor

Why would Congress then in some statutes expressly cover retaliation and in others not?

I mean, that's a little odd, isn't it?

Irving L. Gornstein

--It is, Justice O'Connor, but the explanation for that for... in title VII, for example, is that the core prohibitions in title VII refer to discrimination based on such individual's race, sex, or national origin, and that such individual's language rules out the kind of retaliation claim we are talking about here.

Antonin Scalia

Oh, it rules out this one, but it doesn't rule out the main... look it, this is a weird kind of retaliation claim.

Usually the retaliation claim is the person who has been discriminated against complains about the discrimination, and for that complaint, the person who was discriminated against is demoted or not promoted, or whatever.

That's... that's the classic retaliation claim.

And that classic claim is surely covered by... on the basis of that person's sex.

Irving L. Gornstein

If... if it's based on the fact that the... that the person is complaining about sex discrimination and not on the sex of the complainer, it's exactly the same theory of discrimination that we have here, Justice Scalia.

And that theory of discrimination was recognized in the Sullivan decision.

Discrimination occurs when there is retaliation against a person because he's complaining about racial discrimination.

Antonin Scalia

What was the date of the Sullivan case?

Irving L. Gornstein

It was 3 years before Congress enacted section... I think it was '68... '69.

I'm sorry.

'69.

Antonin Scalia

'69.

Irving L. Gornstein

It was '69, Justice Scalia.

Antonin Scalia

And... and you think that we take the same approach to implied causes of action today that we took in 1969?

Irving L. Gornstein

You do not, Justice Scalia, when you are starting afresh, but--

Anthony M. Kennedy

And we certainly did not with a Spending Clause case.

Irving L. Gornstein

--That's true, Justice Kennedy.

But to answer Justice Scalia's question, first, you operate in the legal context in which Congress was operating at the time, and Congress would have understood... and this Court has twice relied on the Sullivan decision in interpreting title IX, once in deciding that there was a private right of action and once in deciding that the private right of action included a claim for damages.

Antonin Scalia

I don't know what case it is, but one of our cases, the argument was precisely made that the statute before us had been enacted by Congress before we had set our face against implied causes of action, and therefore, we should interpret that statute the way we used to in 1969, and we rejected that argument.

We said that our new rule, as to when you find implied causes of action, will be applied to all statutes, whether they were enacted by a Congress that... that thought we would go skipping along forever as we did in 1969 or... or not.

And... and that's what you're asking us to do here.

Irving L. Gornstein

Justice--

Antonin Scalia

Just because Congress in... in the... at the time this statute was enacted believed in the existence of a Supreme Court that would readily find implied causes of action, we... we have to do that for all these old statutes.

Irving L. Gornstein

--Let... let me talk about the cases that I think the principle that you're talking about emerges from.

One is the Central Bank case, and what you were asked to do there was to add the words, aiders and abetters, to the statute.

We're not asking you to add words to this statute.

We're asking you to interpret the words that are there--

Anthony M. Kennedy

But what about Virginia--

Irving L. Gornstein

--in light of the relevant context.

Anthony M. Kennedy

--What about Virginia Bankshares?

Irving L. Gornstein

I'm... I'm not sure about Virginia Bankshares, but I don't think it... it states a principle.

The other case that I was thinking about, Justice Kennedy, is the... is the Sandoval case.

And again, there somebody was asking you to afford a private right of action for something that the statute did not itself prohibit.

And what we are saying here is, interpret this statute in light of the legal context that Congress had it, which is--

Sandra Day O'Connor

Well, it... it's arguable except that Mr. Jackson was not discriminated against because of his gender.

Irving L. Gornstein

--That's correct.

But this statute does not require discrimination because of such individual's sex.

It require--

Sandra Day O'Connor

--exactly like title VII, but--

Irving L. Gornstein

--It's... it's written exactly not like title VII, Justice O'Connor, and it's written far more like section 1982, which was at issue at Sullivan, which doesn't have a such individual's limitation.

And in... and section 1982 was interpreted to mean discrimination on the basis of race in depriving people of interests of property violates that statute and affords a private right of action of the victim of retaliation.

And so too here.

And a person who is victimized by retaliation because that person has been subjected before... because he complained about sex discrimination is a victim of discrimination within the meaning of this statute.

Antonin Scalia

And that's where you hang.

You... you really think Congress, when it enacted title IX, paid close attention and said... instead of saying no person in the United States shall on the basis of that person's sex be excluded from participation, you think somebody had... had suggested that language, and they said, oh, no, no, no, that would make it too narrow.

We have to take out that person's.

I... I don't... it doesn't strike me as a... as an obvious import of not including the word that person's sex.

It's a very natural way to write it: no person in the United States shall on the basis of sex.

Irving L. Gornstein

But this is... it opens it up to this interpretation, and then you have to look at all the relevant considerations.

Inserting the words, such individual's, would foreclose that kind of retaliation claim, and it's not here.

And so it's... then you have to look at all the other relevant considerations, including Sullivan, including the fact that this is of vital importance to promoting the purposes of the act, including the fact that the agencies responsible for enforcing this provision have both interpreted... the key agencies have interpreted it to encompass protection against retaliation, and including the fact

that there's absolutely no legitimate interest that a... a recipient has in retaliating against somebody simply because he's filed a title IX sex discrimination complaint.

Ruth Bader Ginsburg

Mr. Gornstein, what implication would there be, if we took the view of the circuit here, for Federal employment?

Title VII does have a discrete retaliation provision, but it doesn't with respect to Federal employees, if I understand.

Irving L. Gornstein

That's correct.

In... it... we... we have taken the position that there is, based on a textual argument within the Federal sector provision, a basis for finding a retaliation prohibition over and above the use of discrimination.

We have not taken that position with respect to the... to some other statutes.

So we do think this is a statute-by-statute analysis and that you just can't adopt an automatic principle that because there's an anti-discrimination provision, it automatically always picks up retaliation protection.

You have to look at it on a statute-by-statute basis.

And here, though, all the relevant considerations, including Sullivan, including the need for this kind of protection to further the purposes of the statute, including the agencies' interpretation of this statute which, by the way, does provide fair notice that this was prohibited, included in... I think I wanted to get back to Justice Kennedy's question about the Spending Clause.

What the Spending Clause does not require is that it specifically refer to retaliation any more than it required that it specifically refer to peer-on-peer harassment.

What it does require, though, is fair notice, and that fair notice is supplied by the Sullivan decision, this Court's cases saying that Sullivan is an important backdrop principle against which title IX was enacted, and finally the regulations themselves, which specifically forbid retaliation.

Antonin Scalia

Are punitive damages available under title IX?

Irving L. Gornstein

I'm sorry.

Punitive damages would not be available against a municipality or against a... but it could be available against some other private recipients.

John Paul Stevens

Thank you, Mr. Gornstein.

Mr. Thomas.

Kenneth L. Thomas

Justice Stevens, may it please the Court:

Justice O'Connor, I would like to respond to the question that you raised immediately.

I can't think of any school board lawyer who is called by his superintendent and told that I had a letter from OCR and they want to know why you aren't doing this and that who would not be in that superintendent's office that moment because when OCR comes in, they canvas everything.

I mean, and as a part of negotiating and their investigative teams, they're lay people.

They're not lawyers.

They come in demanding, and what they prepare for compliance, I can't even begin to articulate how overreaching it is.

And so I say I wanted you to--

Ruth Bader Ginsburg

How often has OCR come to the school district in question under title IX?

There are many statutes that--

Kenneth L. Thomas

--And I would want to suggest--

Ruth Bader Ginsburg

--OCR administers.

Kenneth L. Thomas

--In 1996, we had a conclusion of an OCR title IX investigation because it dealt with boys' football as it related to related sports offered for girls.

So we... we know about OCR, and they're in Atlanta.

They are about 167 miles away and when... and when they come, they come, Your Honors.

If I may, I'd like to get right now to what I had raised as the issue here, and that's whether or not an implied private right of action under title IX for retaliation for petitioner who himself says that he's not a victim of discrimination, but merely an advocate.

He's an advocate of gender equity, and we say no.

Ruth Bader Ginsburg

How does he differ... how does he differ from the renter in Sullivan who was complaining about the refusal to sell or lease property to African Americans?

He wanted to lease his property, and as a result, he was thrown out of the club.

And this Court said he could maintain that suit.

Kenneth L. Thomas

Justice Ginsburg, I offer this one observation.

Under 1982, there is not a corollary administrative remedy.

So in the Sullivan situation, the only advocate available at that time was the owner of the home.

And... but I would comment that as he continued in his litigation, he continued to advocate.

Under title IX, as we have discussed, for the advocate is the phone call, the toll-free call to OCR and express your concerns and your issues about what's happening.

And we find significance in that because the ultimate benefit is for the designated class, which would be the basketball team.

In a private lawsuit filed by Mr. Jackson, the damage award goes directly to him.

If he's successful in getting injunctive relief, it goes only to him.

In other words, school board, you can't retaliate or you're enjoined from retaliating against him in the future, but nothing from that Federal court would go to benefit the girls' basketball team.

David H. Souter

Well, what... what do you make of the... the point that Mr. Dellinger stressed and others have stressed that, in fact, there is no administrative remedy in the real world?

It's... it's... there... there have never... there has never been an instance in which funds have been withheld.

Kenneth L. Thomas

Well, again, Justice Souter, no, the funds have not been terminated.

But I can only share with you my experiences with dealing with these people.

Ruth Bader Ginsburg

May I ask you with respect to that, is OCR so different from other agencies that have to pick and choose because they simply don't have the resources to enforce?

Now, how often does OCR, in fact, go in and investigate?

How many times do they say, well, it's low priority for us, girls' soccer or girls' basketball, and we have bigger fish to fry?

Kenneth L. Thomas

Justice Ginsburg, the only thing that I can say is that on my watch, the number

one priority is to keep OCR out.

So... so therefore--

Ruth Bader Ginsburg

But that wasn't my question.

My question is of the universe of complaints that are made under title IX, how many does OCR actually follow up, or isn't it strapped for resources so that it can't, however much it may want to, come in the way you described?

Kenneth L. Thomas

--Well, Your Honor, that was something that was recognized in Cannon.

I... I think that was cited in several of the footnotes.

Ruth Bader Ginsburg

And that was the very reason for recognizing a private right of action because the... the requirement, the anti-discrimination requirement, would be a dead letter if you didn't have people who could enforce it.

Kenneth L. Thomas

But... but again, stay mindful.

Geraldine Cannon, though, she said, I did not get admission to the... the med school because of my sex, and she is clearly within the proviso of no discrimination on the basis of sex.

So--

David H. Souter

Yes, but the... the argument that's being raised is whether we're talking about the person who is listed in the statute as the primary beneficiary of the anti-discrimination statute or whether we're talking about the teacher who blows the whistle and so on... the... the argument is unless you allow this teacher or this whistle blower to... to bring the private action, your statute is a dead letter, that the... that if... if... once you recognize a private action, you've either got to recognize this kind of private action or you can forget the whole thing.

That's the argument, and... and so simply to say, well, they're not within the... the primary ambit of benefit of the statute is... is not to the point of the argument.

Kenneth L. Thomas

--Justice Souter, let me offer this in two ways.

One, it's not realistic.

In... in other words, when... when you have a scenario about the private cause of action, teachers aren't... I mean, these parents and... and the... and especially in Birmingham, we have an athletic director at the school.

We have a director of athletics for the whole school system.

And so that... that's not realistic, I mean, because at the end of the day, the administration is very conscientious about all of its programs.

Ruth Bader Ginsburg

Well, that's... to say trust me is... is not an answer.

Cannon is one thing, a woman in her 30's.

A sixth-grader who is told she can't play on a team because there's none for girls is hardly similarly situated and the law won't be enforced as to her unless you have someone who is best positioned to know what is going on, who is the coach.

Kenneth L. Thomas

But, Justice Ginsburg, we get back to the point who really benefits because... and especially in this scenario, if the advocate sues and receives the monetary damages, that goes to the advocate.

Ruth Bader Ginsburg

The... the point is if you say to the school, you cannot retaliate against someone because a complaint has been made, that's a powerful incentive for the school not to retaliate against someone and to do something about the discrimination.

Kenneth L. Thomas

Well, but again, though, Justice Ginsburg, the other side of that would be when

under the spending legislation, the school board had a right to know what the terms and conditions of the financial assistance would be, and I respectfully submit to you that there was nowhere on the landscape that--

Ruth Bader Ginsburg

Why wasn't it in the regulations of the agency spelled out rather clearly... the... the agency that says, Congress has told us to implement this statute, here are our regulations and our regulations are you don't retaliate?

Kenneth L. Thomas

--But that's a part of the complaint and investigatory process.

Now, Justice Ginsburg--

Antonin Scalia

The regulations didn't say anything about a private cause of action, did it?

Kenneth L. Thomas

--No, it did not.

Antonin Scalia

And the statute didn't say anything about a private cause of action.

Kenneth L. Thomas

It's not on the face.

Sandra Day O'Connor

But the regulation did tell the school not to retaliate in effect.

Tell me, does the record disclose what happened to the petitioner, Jackson?

What... what has been the result of all this?

Does the record tell us that?

Kenneth L. Thomas

No, it does not, Justice O'Connor.

And... and again, it's on a motion to dismiss, and obviously, once it was--

Sandra Day O'Connor

Does it tell us that he was removed as coach?

Kenneth L. Thomas

--Yes.

Sandra Day O'Connor

Does the record tell us that?

Kenneth L. Thomas

It... it does say that he was relieved.

Stephen G. Breyer

Can I ask you a legal question, nothing to do with, you know, practicalities?

Kenneth L. Thomas

Yes.

Stephen G. Breyer

But suppose you go back to the very old, bad days of the 1950's in the South, the '60's.

They pass some civil rights legislation.

A lot of legislation was passed in the '60's.

Now, under that civil rights legislation, imagine an individual had been kept out of a restaurant or he'd been treated physically badly, not because of his race.

He was white, but he was associating with people who were black.

And they both go into the restaurant and they both are refused service.

Maybe they're beaten up.

I mean, both of them.

Now, can the white individual bring a lawsuit under the... the civil rights statute?

I've always thought the answer to that question is, of course, he can.

Would you... do you think it's the contrary answer?

Kenneth L. Thomas

Justice Breyer, in that context--

Stephen G. Breyer

Yes.

Kenneth L. Thomas

--I... I would say yes.

Stephen G. Breyer

Yes, of course.

Kenneth L. Thomas

But again--

Stephen G. Breyer

So therefore--

Antonin Scalia

Is this a civil rights statute that provides for a private cause of action?

I... I want to know what the hypothetical is.

Stephen G. Breyer

--I'd... I'd like to... I'm thinking of various civil rights statutes which make it unlawful to describe... to... to discriminate.

And now, I agree with you on that answer.

The white person could bring a lawsuit on the basis of someone else's race because he's being discriminated against not because of his own race, but because he's being... he's associated with people who are being discriminated against.

I agree with your answer.

And so my question is if that's so and if we have a long history here of the words, on the basis of sex, including retaliation not on the basis of my sex, but retaliation on the basis of someone else's sex... that's what I've complained of... why isn't this the same thing And to get out my whole question... there are two parts... why isn't this the same thing?

And the second part is, because I think it is the same thing... the second part is once it is included in 1981... in... is it 1681(a)?

Kenneth L. Thomas

--Yes.

Stephen G. Breyer

Once we include this in 1681(a), that's the end of this case because Sandoval then supports the other side.

It doesn't support you.

All right.

That's my question.

Kenneth L. Thomas

Justice Breyer, don't we have to consider at some point in time what the congressional intent was?

Stephen G. Breyer

Well, yes.

Kenneth L. Thomas

And again... and I submit to you--

Stephen G. Breyer

So you... you go ahead.

I'm doing it purely as a matter of logic.

I'm saying the old civil rights cases make clear it doesn't have to be on the basis of your own race.

History makes clear that retaliation on the basis of someone else's race does fit within... or gender does fit within 1681, and then that's the end of the case.

So I would like your response to that logic.

Kenneth L. Thomas

--And I would want to submit to you interveningly you have had the passing of the Voting Rights Act of 1965.

So everybody now has access to Congress.

The whole spectrum of American society is in Congress.

So if Congress is being well represented, when it passes the law in 1972, as it did here, it had a different perspective on it.

Going back to 1969, some things were foreclosed to some of the citizens of the United States.

So, obviously, the scenario of someone advocating, like in Sullivan, would make sense.

But I submit to you respectfully, that's not the case now.

Over there in Congress is where this debate needs to be, and on the face of this statute, it's not there.

Retaliation is not there.

If I may, though, Justice Breyer, let me also add as a practical consideration--

John Paul Stevens

Of course, you say it's not there, but the agencies interpreting the statute thought it was there.

Isn't that correct?

Kenneth L. Thomas

--But... but that's an... an investigatory... the administrative enforcement scenario.

Ruth Bader Ginsburg

But it's the--

John Paul Stevens

No, but their reading of the statute was that the word discrimination included a retaliation claim.

That's the kind of regulations they drafted on the basis of their understanding of what Congress intended by using the word... the words in this statute.

Kenneth L. Thomas

But don't we go... Justice Stevens, don't we go back to Sandoval?

Can you in a regulation do more than what the statute requires?

John Paul Stevens

You cannot use the regulation that goes beyond the meaning of the statute.

That's what that holds.

But a regulation interpreting what the statute itself provides is in a different ball park.

And that's what I understand these regulations to have done, to say what the agencies thought the statute itself meant.

Kenneth L. Thomas

But... but again, that's retaliation after someone has filed a complaint with the appropriate office.

Stephen G. Breyer

Well... I mean, Sandoval is very clear.

It's a very clear opinion in my view.

Very clear.

And the key language I thought is, the language statutes that focus on the person regulated rather than individuals protected create no implication of an intent to confer the private right.

So they're looking at disparate impact and disparate impact, according to the majority... I was in the dissent... did not intend to protect the person discriminated against, but was a way of regulating people so they wouldn't intentionally discriminate.

I can understand that.

But I apply the same... I didn't agree with it, but I can understand it.

The... the... I apply the same reasoning here.

The reasoning here is that this retaliation thing is not trying to protect university behavior one whit more than the whole underlying thing is trying to protect university behavior.

This is about victims.

Retaliation and being fired is about victims.

And so given Sandoval, then we have the history, we have the language, and we have that sentence from Sandoval.

And all that suggests... it goes into 1681(a), in which case Sandoval says, a private right of action, given Cannon, would be inferred.

Now, what's... what's... that's how... I'm tracing out the logic of the thing.

So I want to see what you say.

Kenneth L. Thomas

Well, Justice Breyer, on the face of the statute, I just can't get there.

I apologize for that, respectfully, but... but I can't.

And Justice O'Connor, as a follow-up, interestingly enough, in a case on all fours in 1995, Holt v. Lewis, the United States District Dourt for the Northern District of Birmingham... for the Northern District of Alabama made very clear that an implied private right of action was not cognizable under title IX, and that the regulation was not a basis to follow it.

And... and I submit to you on that basis, that in Birmingham, at the very least, because the case was affirmed by the Eleventh Circuit and this Court denied cert in 1997, so anyone who would go--

Sandra Day O'Connor

We... we can't... you don't base your argument on giving some legal effect to denial of certiorari--

Kenneth L. Thomas

--No, no, I don't, Justice O'Connor.

Sandra Day O'Connor

--Thank you.

Kenneth L. Thomas

But... but to say... I was trying to emphasize was the notice and the mind set of the board when it accepted these Federal funds.

It had no way of anticipating that retaliation--

John Paul Stevens

It had never anticipated a private right of action, even though it read the Cannon opinion, which was written some 20 years ago?

Maybe more than that.

I don't remember.

Kenneth L. Thomas

--Justice Cannon, your opinion there is going to be around for a long time.

The scholars are going to have to debate it for years.

Antonin Scalia

There were some later cases that cast a good deal of doubt on whether we would apply Cannon anymore.

John Paul Stevens

But Congress itself has adopted the rule set forth in Cannon.

Kenneth L. Thomas

But... but if I may, but then Justice Rehnquist cautioned very clearly that the Court... in his concurring opinion, that the Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the legislative branch.

And that just speaks volumes to me.

Ruth Bader Ginsburg

--It said in this statute we do, having in mind that title VI would be interpreted in the identical way--

Kenneth L. Thomas

Yes, ma'am.

Ruth Bader Ginsburg

--title VII... VI proscribing race discrimination in all Federal programs.

So it said these statutes aimed at race discrimination, sex discrimination do have a... a private right of action, and that was the holding of this Court.

Kenneth L. Thomas

Yes, ma'am.

Well, but... but again, it goes... goes back to... but would that include retaliation?

And... and--

Ruth Bader Ginsburg

Well, it seems to me that if you're talking about the sixth grade soccer team, realistically the only one who is going to know anything... enough and be brave enough to complain will be the teacher.

And if you cut the teacher out, then forget it.

You have nice words on paper and they'll never be enforced.

Kenneth L. Thomas

--But, Justice Ginsburg, that teacher could easily, if they don't get a positive response from the administration, they can call OCR.

Ruth Bader Ginsburg

And OCR says, as it usually does, we're too busy.

Sorry.

Kenneth L. Thomas

No.

They... no--

Ruth Bader Ginsburg

Congress didn't give us enough money to do the job.

Antonin Scalia

Do we know that?

I mean, do we have any idea how effective the enforcement of OCR is?

Just because they haven't cut off funds--

Kenneth L. Thomas

--I... I--

Antonin Scalia

--they may well not have cut off funds because anybody who gets a directive from them will hop to it.

Kenneth L. Thomas

--Justice Scalia, that's exactly it.

I mean, I have firsthand knowledge that when they call, we're supposed to jump.

It's no doubt about it.

Antonin Scalia

And do they call more than infrequently?

Kenneth L. Thomas

All the time.

And... and the other side of that coin--

Ruth Bader Ginsburg

This is your personal testimony.

Kenneth L. Thomas

--Yes, ma'am.

Yes, it is.

[Laughter]

And... and Justice--

Ruth Bader Ginsburg

There is... there is much testimony on the other side that says we call and call and they don't come.

Kenneth L. Thomas

--Well, I've been in educational law now almost 27 years, representing both teachers and school boards.

So I have firsthand knowledge. I mean... and I've experienced it both at the secondary level and higher ed.

I mean, when they come in, they come in.

Ruth Bader Ginsburg

How many title IX complaints in your... in your experience?

You mentioned one.

Is there any other?

Kenneth L. Thomas

Two.

Ruth Bader Ginsburg

Two?

In how many years?

Kenneth L. Thomas

In 26.

Ruth Bader Ginsburg

Two in 20-something years.

Kenneth L. Thomas

Yes, ma'am.

But they're all memorable.

[Laughter]

They're all... thank you.

John Paul Stevens

Thank you, Mr. Thomas.

Mr. Newsom.

Kevin C. Newsom

Thank you, Justice Stevens, and may it please the Court:

I'd like to address, if I may, several concerns that have been raised during the... the preceding arguments.

One is to clarify some things about the scope of the administrative remedy.

The other side, with respect, wants you to think that without the implied right of action for damages and fees, whistle blowers are left out in the cold.

That is not true.

The administrative remedy... it's not just about funding termination.

34 C.F.R. 106.3 says that the OCR may use any remedy that it deems necessary.

The OCR, as we say in our brief, has itself touted its flexible approach to enforcement which includes, among other things, as this Court noted in Gebser, citing back to its earlier... pardon me... decision in North Haven, individualized relief in appropriate circumstances.

So the point, as Senator Bayh himself noted on the floor of the Senate, is that it is the threat of... of funding termination.

So while the OCR is wielding the club of funding termination, they can extract or leverage individualized relief in appropriate cases.

David H. Souter

Do we... do we have any... any empirical evidence as to... as to what they have thus leveraged?

Kevin C. Newsom

None that I am aware of, Your... Your Honor, but--

David H. Souter

The... the other side says, look, dead letter.

What do we know about such life as there may be in the letter?

Kevin C. Newsom

--Well... well, I will, I assume, perhaps foolishly, defer to the Solicitor General's office to tell you what... what the DOJ has and hasn't done.

What I can tell you is that... that the DOJ manual that the other side cites throughout its briefs expressly encourages agencies, when enforcing these... these things, to leverage even damage awards on behalf of individual claimants.

So I can tell you that, as a matter of policy, this is far from a dead letter.

Antonin Scalia

You... you don't concede the point that it is the role of this Court to determine whether agencies are inefficient or not--

Kevin C. Newsom

Of course not.

Antonin Scalia

--and if they are inefficient to... to raise up private attorneys general to... to fill the void?

Kevin C. Newsom

Of course not, Justice Scalia, and... and the Court knows very well from my brief that our position is that when you're talking about implied rights of action, this Court has made clear, in the cases leading up to Sandoval, culminating in Sandoval, that these sorts of policy considerations really are not relevant.

Stephen G. Breyer

All right.

If they're not relevant, do you think that the regulation which provides... do you

think it's unlawful?

Kevin C. Newsom

We do not contest the validity of the regulation.

Stephen G. Breyer

Okay.

If you don't contest the validity of it and you think it's lawful, do you think it's doing something other than interpreting 1681(a)?

Kevin C. Newsom

Absolutely, Your Honor.

Stephen G. Breyer

What... what is it doing?

Kevin C. Newsom

It... section 100.7(e), the regulation upon which Jackson chiefly relies, we readily concede is a valid, effectuating 902 regulation, but all... all it does by its text... and its structure makes clear all it does... is to govern the internal processes of official OCR investigations.

It does not go further than that.

This Court in Sandoval was very clear that it was... that it was only authoritative interpretations of a statute's terms that can be enforced pursuant to that statute's implied right of action.

Another point I want to make about the administrative remedy.

Justice Ginsburg asked whether funds had ever been withdrawn, and even there, again, if the answer is no, the point is not whether funds have been withdrawn, but that as Senator Bayh himself noted, that the threat of funds is where the heavy lifting is done in administrative enforcement.

Another point about administrative enforcement is whether or not there are sufficient resources.

That, obviously, was a valid concern in Cannon, given presumably the

inordinate number of complaints about core, traditional discrimination.

But as the other side has made clear in its briefing in this case, at page 26 of the petitioner's brief... and then there's a brief filed on behalf of the Southern Poverty Law Center that spins this out in some detail... there just aren't many of these retaliation claims out there, either in the... either... either in the judicial system or at OCR.

Sandra Day O'Connor

Why is that, do you think?

Kevin C. Newsom

Well, my... I'm sorry.

Sandra Day O'Connor

Is it because no remedy is available, or is it because there are just very few instances giving rise to such?

Kevin C. Newsom

Well, I think in all likelihood, it is the latter.

Certainly I would think that the Court would presume... would not presume ill of local school districts and... and even State universities, but would presume that they are complying with, if not clearly articulated law, certainly good public policy.

The second point is that what the... the absence of private actions for retaliation shows is that title IX's remedial apparatus is kicking along just fine without the implied right of action.

Sandra Day O'Connor

Do we decide this case on the assumption that there was retaliation here by virtue of a complaint of violation of title IX?

Kevin C. Newsom

Certainly, Your Honor--

Sandra Day O'Connor

We should decide it on that assumption.

Kevin C. Newsom

--You have to take as true, of course, the facts as pledged in the... as pleaded in the complaint.

Another point I'd like to make briefly is about the comparison to title VII.

The other side wants you to look very closely at title VII when you're... whether it's on the basis of sex or on the basis of such individual's sex, but they want you to ignore title VII and the fact that it very clearly and expressly deals with retaliation in a separate subsection, a separate provision.

And I didn't... I'll have to confess I didn't hear much during the first argument.

I had my head in my own book, but what I did hear is Justice Souter referring to the... the... an instance in which Congress has a choice of two models for... for constructing a statute, and it chooses one over the other, and isn't it a reasonable inference to allow Congress to make that choice.

That's what happened here.

Ruth Bader Ginsburg

Like the choice it made in 1982, very spare statute.

When Congress got to title IX, it knew about Sullivan and so it... this... this statute in its breadth and its simplicity bears a striking resemblance to the old pattern in 1981 and 1982 and 1983.

So if you say to me, look at the closest model, it would be that and not the more detailed civil rights legislation that came in '64 and '65.

Kevin C. Newsom

Well, if... if I could answer in two parts.

First, to say that I think what was going on in 1964 in the Civil Rights Act, obviously, you have Congress in title VII addressing itself both to discrimination and to retaliation separately; in title VI, passed as part of the same piece of legislation, addressing itself solely to discrimination.

And to use Justice Souter's analogy, in '72 Congress takes the title VI model

and not the title VII model.

Now, to get to your question specifically, I think, about Sullivan is at the heart of your question, Sullivan... I think there are a number of problems with the other side's reliance on Sullivan.

First, with all due respect to this Court, Sullivan itself is pretty opaque.

It certainly does not announce with flashing lights a principle that every anti-discrimination provision necessarily entails a subsidiary or corollary--

Ruth Bader Ginsburg

It says if you're thrown out of the club because you champion the rights of a black man, you have a right to sue under this statute.

Kevin C. Newsom

--Even if I were to grant your assumption of clarity in Sullivan, which Justice Harlan, I presume, would not agree with... he was left sort of scratching his head trying to figure out what the Court was trying to do.

But even granting your assumption, if 1982 can be construed that way, that... that construction does not necessarily carry over to every anti-discrimination provision.

1982, of course, uses different language to begin with and, more importantly, is... is passed under Congress' power under the Thirteenth Amendment, which is the broadest conceivable--

John Paul Stevens

Yes, but it did construe the word discrimination, didn't it?

Kevin C. Newsom

--No, sir.

Discrimination is not even in... is not even in title... rather, in 1982.

So the language is very different--

Ruth Bader Ginsburg

On account of race is in it.

Right?

Kevin C. Newsom

--I'll have to confess I don't... it does say something like every person shall have the same right as... dot, dot, dot, as white persons.

But so the... the language frankly is pretty different, and the more fundamental point I'm trying to make is that even if that's true for... for that statute passed under that constitutional power, here we are talking, as Justice Kennedy made clear at the very outset of the argument about a Spending Clause statute, where it is required that conditions on the acceptance of Federal funds be express, and it is not clear to me where the Birmingham Board would have gotten its clear notice in this case.

If you can imagine--

Ruth Bader Ginsburg

It seems to me they would get it when Congress says, and here's the statute, very spare, and agency, you get up guidelines, that any responsible school board would say, well, we've got only one sentence in the statute.

We better look at the regulations to find out what's required.

Kevin C. Newsom

--I agree, and... and if... and if the Birmingham Board, which I trust it did, looked to the regulation here, what it would have found is a regulation not that clarifies the substantive scope of title IX, but instead that... that manages the internal operating procedures for official agency investigations.

So to be sure, the Birmingham Board was on notice that it could not retaliate in... in the business of an official OCR investigation, and if it did, it would be subject to administrative enforcement, but it was... it was not on notice either of the fact that there was a generic anti-retaliation prohibition, much less the fact that if it violated any such nonexistent--

Ruth Bader Ginsburg

But it's... we're not talking about the procedure, I mean, what procedural moves.

What must you do to comply?

And it has in there you don't retaliate.

So you mean that a board could responsibly take the position, well, the... the regulations tell us we don't retaliate, but when we're not faced with any agency breathing down our neck, all we have is a teacher in front of us, then we can retaliate?

I mean, they must have known the statute meant don't retaliate.

Kevin C. Newsom

--And... and with respect, I think there is a difference, particularly given the clear notice requirements that this Court has... has used in Spending Clause cases between retaliation in the context of an OCR investigation and retaliation generally, but... I'm sorry.

Ruth Bader Ginsburg

I... I really don't get that.

If the rule is don't retaliate and if we investigate, that's one of the things we're going... that's going to be on our checklist.

But the substantive rule is don't retaliate.

Kevin C. Newsom

Justice Stevens, may I respond?

John Paul Stevens

Yes.

Kevin C. Newsom

Even granting your assumption, Justice Ginsburg, what is painfully not clear is that the... is that the Birmingham Board would be subject to... to a private right of action for damages and fees even in... in the event that there were some generally applicable anti-retaliation provision.

John Paul Stevens

Thank you, Mr. Newsom.

Kevin C. Newsom

Thank you, Justice Stevens.

John Paul Stevens

Mr. Dellinger, you have about 3 and a half minutes.

Walter E. Dellinger, III

I should make it clear that we're not asking this Court to create or infer a new cause of action.

We're asking the Court to interpret the cause of action that the Court itself recognized in Cannon v. the University of Chicago, that was validated by Congress.

It was reaffirmed in the Court's opinion in Sandoval.

And when you look at the scope of that... of that prohibition, that cause of action, why would it not extend to retaliation?

The idea that you--

Antonin Scalia

Other statutes do it separately.

Walter E. Dellinger, III

--I understand.

Antonin Scalia

Other statutes don't view the one as... as being incorporated in the other.

Walter E. Dellinger, III

The practice of Congress has not been consistent on incorporating express provisions sometimes because of language differences, but there are half a dozen major statutes that the courts of appeal have consistently assumed included retaliation as part of discrimination.

Section 1981, section 1982, title VI, 1982 as determined by this Court, parts of the Rehabilitation Act have all been construed that way.

And why would they not?

The notion that you have to admit Geraldine Cannon to the University of Chicago medical school, you can't discriminate against her on the basis of sex, but then you could turn around and expel her for complaining about your admissions policy makes no sense.

In this case, relying upon the vagaries of what any administration might do about enforcement is not necessarily what Congress wanted, and that was this Court's decision in Cannon.

And it's reaffirmed it frankly--

Antonin Scalia

There are no vagaries in private enforcement.

Private attorneys general always act in the interest of the whole polity.

There are no vagaries there.

Walter E. Dellinger, III

--Well, in this case, it has been known to effectuate anti-discrimination laws in order to bring them about by allowing people to step forward.

The last point they make is that even if there's a cause of action, and even if the cause of action covers retaliation, it cannot be brought by Coach Jackson because he's not also the victim of the underlying discrimination.

That makes no sense in law or in logic.

If the captain of the boys' basketball team joins with the captain of the girls' basketball team in a supportive way to say, they're just not treating girls' basketball equally and fairly, and they're both suspended from their teams or dropped from the honor society in retaliation, it makes no sense.

Either they both have... they've both been discriminated against on the basis of sex because they're trying to rectify sex discrimination or neither is.

And in this case, it's going to be critically important that this valuable statute, which has meant so much for athletic and academic opportunities for women, to have people like Coach Jackson able to be confident that they've got a right that they can enforce that will allow them to come forward within the school itself

and try to rectify these anomalies in and under title IX.

Thank you.

John Paul Stevens

Thank you, Mr. Dellinger.

The case is submitted.

The honorable court is now adjourned until tomorrow morning at ten o'clock.